SUPREME COURT, U. S.

FILED

JAN 4 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-9911

SUNNYSIDE SCHOOL DISTRICT No. 12, *Petitioner,*

vs.

THE UNITED STATES OF AMERICA, *Respondent.*

Supplement to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

DENNIS DE CONCINI
Pima County Attorney

By: LAWRENCE OLLASON
Special Deputy County Attorney
For School Affairs
182 North Court Avenue
Tucson, Arizona 85701
Counsel for Petitioner

RICHARD M. DAVIS
177 N. Church Avenue
Tucson, Arizona
of Counsel

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

United States Court of Appeals for the Ninth Circuit

No. 72-2533

United States of America,
Appellee,

vs.

Sunnyside School District No. 12,
Appellant.

ORDER

[August 29, 1973]

Appeal from the United States District Court
District of Arizona

Before: HUFSTEDLER, KILKENNY and CHOY, Circuit Judges.

The appellant's motion, which we treat as a petition, for rehearing in the above entitled cause is DENIED.

United States Court of Appeals for the Ninth Circuit

No. 72-2533

United States of America,
Appellee,
vs.
Sunnyside School District No. 12,
Appellant.

MOTION FOR REHEARING

COMES NOW Sunnyside School District No. 12, appellant herein, and moves the Court to rehear, reconsider, and reverse its order and judgment herein entered on the 29th day of August, 1973, affirming the order and judgment of the District Court appealed from herein, on the following grounds:

1. The Court erred in its opinion order in holding that the case was controlled by the case of City of Burbank v. Lockheed Air Terminal, Inc., ... U.S. ..... 36 L.Ed. 2d 547 (rendered May 14, 1973).

2. The Court erred in finding to hold that the issuance of a preliminary injunction was an abuse of discretion.

ARGUMENT

The Court has failed to perceive the essential thrust of the present case which distinguishes it from the City of Burbank case.

The City of Burbank case involved an ordinance, which, if valid, took an entire airport out of national and interstate "pure jet" commerce for one-third of every day. The Supreme Court was manifestly concerned with the fractionalization of control over traffic flow which would result from

a patchquilt of municipal airport curfew laws. See, e.g., the text at note 22 of the majority opinion.

The distinct aspect of the present case can be dramatized by a hypothetical variation on the actual facts of the state court litigation.

Suppose, for some reason peculiar to its function, the Sunnyside School District switched to an educational program in which it had classes only on Mondays and Tuesdays. Suppose also that thereafter, the commander-in-chief of the Arizona Air National Guard (the defendant in the enjoined litigation) for some unknown reason issued a directive that all Air Guard flights were to be flown on Mondays and Tuesday. What, *as a matter of federal law*, would or should prevent an Arizona State Court from requiring the commander-in-chief of the Arizona Guard to direct that flights be made on days other than Mondays and Tuesdays?

The Court in essence has failed to distinguish between *regulation* of aircraft flights and the necessarily prior act of *initiating* or *initially directing* that a flight be made. The direction that a flight be made is subject to a later-exercised power of regulation, but the direction itself is an independent act capable of judicial control.

The federal government as a regulatory power has no interest in whether the original decision as to whether flights are to be undertaken (if regulatorily possible) or not. It is not controlling by relevant here that aircraft flight is federally regulated from take-off to landing. Appellant's state court suit for injunctive relief is in its most basic and important thrust on attack, under the peculiar circumstances, upon an assertedly unlimited right to *initiate* or direct in the first instance that aircraft flights be made.

Interstate commerce is not involved. "Air commerce" is not involved. There is no threat of an intolerable patchquilt of local curfew laws. The state court litigation enjoined below was purely and simply a suit between citizens of the same state over the relative rights of running a public education program and a military flight training school. The court has in effect held that the military training school has leaped or been vaulted into an impregnable and untouchable position merely because the federal government has the sole right to regulate, as opposed to initiate aircraft flights.

The appellee, of course, strenuously argued that the Arizona Air National Guard was a federal agency. This argument was not accepted by the court, since affirmance was based solely on the BURBANK case.

The opinion rendered in this case by the Arizona Supreme Court was an important decision in this vital area of jurisprudence. This court has in effect overruled that decision, without analysis.

The court is respectfully urged to rehear and review its decision herein and to render the only decision which is consonant with our dual federal and state system of justice, that is, that the state trial be given an opportunity to render decision between the two Arizona litigants.

Respectfully submitted this 11th day of September, 1973.

DENNIS DE CONCINI
PIMA COUNTY ATTORNEY

/s/ LAWRENCE OLLASON
By: LAWRENCE OLLASON
Special Deputy County
Attorney For School
Affairs
182 North Court Avenue
Tucson, Arizona 85701

AFFIDAVIT OF SERVICE

STATE OF ARIZONA }
COUNTY OF PIMA } ss:

Linda Jeffreys, a notary public in the State of Arizona, county of Pima, does hereby certify that on the 11th day of September, 1973 I served the foregoing motion for rehearing upon counsel for the appellee by causing a copy to be mailed, air mail, postage prepaid, to:

Morton Hollander,
Harland F. Leathers,
Davis J. Anderson
Department of Justice
Washington, D. C. 20530

William C. Smitherman
United States Attorney
110 S. Scott Street
Tucson, Arizona

/s/ LINDA M. JEFFREYS
Notary Public

My Commission Expires:
8/13/77